No. 25–966

IN THE

Supreme Court of the United States

DEPARTMENT OF LABOR, ET AL.,
Petitioners,

v.

SUN VALLEY ORCHARDS, LLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Brief of Amici Curiae National Lawyers Guild, National Employment Lawyers Association, National Legal Aid & Defender Association, California Rural Legal Assistance Foundation, Northwest Workers' Justice Project, and Justice in Motion, in Support of Petitioners

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Interest of Amici Curiae[1]

1. The National Lawyers Guild (NLG) is a nationwide bar association of progressive legal professionals. Founded in 1937, NLG collected attorneys and others in the field to advance labor rights under newly established administrative-law frameworks, like the Social Security Act and the National Labor Relations Act. Our members have kept to the task while expanding our reach into other legal areas, including immigration, housing, public benefits, civil rights, and international law. Stated simply, "[o]ur mission is to use law for the people." NLG, *About*, www.nlg.org/about/. We have 63 local chapters across the United States.

NLG attorneys took interest in the potential passage of The Immigration Reform and Control Act of 1986, and they played a role in shaping the contours of the labor protections required by the H–2A visa program that law established. Our members continue to engage with that law and its protections today, as counsel for agricultural workers. We thus have a longstanding interest in the proper interpretation, operation, and enforcement of the H–2A visa program.

2. The National Employment Lawyers Association (NELA) is the largest professional membership organization in the United States dedicated to advancing employee rights. Its members represent workers in labor, employment, and civil rights cases nationwide. Many NELA members represent agricultural workers who rely on the H–2A visa program for workplace protections. NELA therefore has an interest in how courts interpret the program.

3. The National Legal Aid & Defender Association (NLADA) is America's oldest and largest national

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1 No counsel for a party authored part of this brief. No one other than amici curiae and their counsel made a monetary contribution to the preparation or submission of this brief.

nonprofit organization dedicated to excellence in the delivery of legal services, serving as a collective voice for civil legal aid and public defense systems throughout the nation. NLADA represents thousands of attorneys and advocates in the 50 states, the District of Columbia, American Samoa, Micronesia, Puerto Rico, and the U.S. Virgin Islands. Its membership also includes representatives from communities eligible for legal services. NLADA hosts a section devoted to Farmworker Law and supports maintaining the H–2A visa program's labor protections.

4. The Northwest Workers' Justice Project (NWJP) is a not-for-profit law firm representing low wage, immigrant, and contingent workers in Oregon and the Pacific Northwest with respect to employment matters. It has extensive experience representing workers, including H–2A workers and their organizations, in litigation arising under the H–2A program. Its staff was counsel to plaintiffs in *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997), and *Cejas Commercial Interiors, Inc. v. Torres-Lizama*, 316 P.3d 389 (Or. Ct. App. 2013), seminal cases applying the "suffer or permit to work" definition of employment in the Ninth Circuit and Oregon state courts, respectively, and to amici in *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403 (7th Cir. 2007). It has frequently participated in Department of Labor rulemaking affecting the H–2A program. NWJP is the anchor organization for the Low Wage Workers Legal Network, a national network of 1,246 legal advocates from 235 non-profit firms and seventy-five private firms working in forty-one states, the District of Columbia, Mexico and Puerto Rico.

5. The California Rural Legal Assistance Foundation (CRLA Foundation) is a legal nonprofit that represents farmworkers and other low-wage workers in class and representative actions in federal and state

court. For over 40 years, CRLA Foundation has recovered wages and other compensation for thousands of farmworkers, both domestic U.S. workers and H–2A workers. These workers have been subjected to illegal tactics intended to defraud them of minimum wages, contract wages, and overtime wages due to them.

6. Justice in Motion is a mission-driven national nonprofit organization that advocates for the rights of low-wage migrant workers from Mexico and Central America who work in the United States with H–2A visas and who rely on the Department of Labor to enforce the labor laws that protect them. Justice in Motion is dedicated to ensuring that migrants are treated fairly and have equal access to justice across borders by providing lawyers in the United States and human rights defenders in Mexico and Central America with advice, referral, and case facilitation services. The fact that temporary foreign workers such as H–2A workers cross borders by the design of the program makes them particularly vulnerable to abuse, while simultaneously making it difficult for them to exercise their basic employment rights once they return home at the end of the season, as is required by the visa program. Because of our work on behalf of migrant workers, we know that the Department of Labor's efforts to adjudicate proceedings and collect monetary remedies from employers who violate the terms and conditions of these workers is of the utmost importance to ensure that laws are upheld.

Summary of Argument

The U.S. Court of Appeals for the Third Circuit erred in concluding that the U.S. Department of Labor's (DOL) enforcement proceedings under 8 U.S.C. § 1188 are most analogous to a 1789 contract action, and therefore require first-level Article III

adjudication. DOL's enforcement actions involve a different legal relation, one between a grantor of right and a grantee. In 1789 Great Britain, the power to enforce those relationships lay outside the common-law courts, resting instead with the royal prerogative. Thus the public-rights doctrine applies, as DOL's enforcement proceedings are the kind of matter traditionally reserved to the legislative and executive powers. And that means DOL's administrative-enforcement regime does not violate Article III.

Amici are aware of and in the alternative strongly endorse separate arguments advanced by DOL and in amicus arguments of Public Citizen *et al.* and the AFL-CIO *et al.* In particular, amici strongly support the position that the regulatory scheme for the H–2A temporary foreign worker program appropriately requires employers seeking to participate in that program to waive any rights such employers might seek to assert to initial adjudication by an Article III court of the assurances employers make to DOL as to the terms and conditions of employment that will be offered to temporary foreign workers and U.S. workers in corresponding employment. We do not address those arguments here, and amici rely upon the arguments on those issues by other amici and DOL.

Amici also recognize and advocate for the independent right of aggrieved workers to enforce their contractual and statutory rights in appropriate state or federal courts.[2] However, that is not the issue before this Court.

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2 For example, 42 U.S.C. § 1981 protects the right of all persons to make and enforce contracts within the United States.

Argument

A. Relevant Legal Frameworks and Case History

Congress created the H–2 visa program when it passed the Immigration and Nationality Act of 1952. Pub. L. No. 82–414, 66 Stat. 163. It split the program in two when it passed the Immigration Reform and Control Act of 1986 (IRCA), establishing the H–2A and H–2B visa programs. *See* Pub. L. No. 99–603, § 301(a), 100 Stat. 3359, 3411. The H–2A program permits qualifying employers to temporarily "import" nonresident alien workers into the United States to perform agricultural labor or services. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a); 1184(c); 1188.

An employer must petition the United States Attorney General for permission to participate in the H–2A program. 8 U.S.C. § 1184(c). And the Attorney General may not grant the petition if DOL has not issued the employer a "labor certification." 8 U.S.C. § 1188(a), (c)(3).

Congress authorized DOL to create "criteria" for granting the required labor certification, to establish its associated housing-benefit requirements, and to determine by "notice and opportunity for a hearing" whether an employer had "substantially violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers." 8 U.S.C. § 1188(b)(2), (c)(3)(A)(i), (c)(4). Congress also prohibited DOL from issuing a new certification to an employer that substantially violated a labor certification's terms and conditions over the prior two years. 8 U.S.C. § 1188(b)(2). Last, Congress authorized the Secretary of Labor "to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be

necessary to assure employer compliance with terms and conditions of employment under this section." 8 U.S.C. § 1188(g)(2).

DOL has delegated the responsibility for approving labor certifications to its Office of Foreign Labor Certification (OFLC). 20 C.F.R. § 655.101(a). To obtain one, an employer must first submit to OFLC "a completed job order, * * * including all required addenda." 20 C.F.R. § 655.121(a)(1). A "job order" is a "document containing the material terms and conditions of employment" offered by the employer, 29 C.F.R. § 501.3(a), and it must include pay rates, hours, duration, no-cost housing benefits, meal benefits, transportation benefits, and a work guarantee (at least ¾ of promised work), 20 C.F.R. §§ 653.501(c); 655.121(a)(4); 655.122. Those terms and conditions must also comport with the minimum protections required by § 1188 and its implementing regulations. 20 C.F.R. § 655.122(q). The regulations refer to the job order's terms and conditions "relating to wages, hours, working conditions, and other benefits, including those required by" statute and regulation, as a "work contract." 20 C.F.R. § 655.103.

DOL requires employers to submit job orders by completing Forms ETA-790 and 790A. 20 C.F.R. § 655.121(a)(1). And to complete Form ETA-790A, an employer must swear on penalty of perjury to meet the program's statutory and regulatory minimums for wages, hours, duration, and benefits, as well as the terms and conditions of the job order. DOL, Form ETA-790A at 4–8 (using job order and clearance order interchangeably).

Next the employer may apply for the certification itself, by submitting to OFLC an H–2A Application for Temporary Employment Certification. 20 C.F.R. § 655.130; DOL, Form ETA-9142A. The employer's

Forms ETA-790 and 790A must accompany this submission, 20 C.F.R. § 655.130(a)(1), and the employer must again swear on penalty of perjury to comply with the job order's terms and conditions, and to comply with all federal, state, and local laws and regulations, *see* DOL, Form ETA-9142A § F; DOL, Form ETA-9142A – Appendix A § B; 20 C.F.R. § 655.1305. OFLC may then deny the certification, grant it, or grant it in part. 20 C.F.R. § 655.160–.162.

DOL has delegated its "investigatory and enforcement functions" under the H–2A program to its Wage and Hour Division (Wage Hour). 20 C.F.R. § 655.101(b). If Wage Hour's Administrator "believes" an employer violated § 1188 or its regulations, she may issue a written notice of determination against them. The order may assess a civil monetary penalty, increase a surety bond, administratively enforce "contractual obligations," or administratively enforce statutory and regulatory "obligations." 29 C.F.R. §§ 501.31, .32. It specifies that the Administrator's enforcement order may include "the recovery of * * * monetary relief." 29 C.F.R. §§ 501.31.

An employer that receives a determination notice may request an administrative hearing, 29 C.F.R. § 501.33, wherein the Administrator acts as plaintiff and the employer as respondent, 29 C.F.R. § 501.36. An administrative law judge next hears the case and issues a decision. 29 C.F.R. §§ 501.37(a), .40. Any party may petition the Administrative Review Board (ARB) to review that ALJ decision. 29 C.F.R. § 501.41. If the ARB declines review, the ALJ's decision becomes final agency action. 29 C.F.R. § 501.42(a). If it accepts review, it must issue a decision, and *that* becomes final agency action. 29 C.F.R. § 501.45. Whichever path, parties may challenge the administrative action—"after the administrative

remedies have been exhausted"—by filing a complaint in federal district court. 29 C.F.R. § 501.47.

In this case, the Administrator issued a determination notice to Sun Valley Orchards, LLC, an H–2A employer. Pet. App. 183a. It ordered Sun Valley to remit civil penalties and unpaid wages to DOL.[3] *Id.* at 184a. An ALJ heard the case and largely affirmed the order. *Id.* at 179a. The ARB affirmed. *Id.* at 76a. Employer challenged the final order in the U.S. District Court for the District of New Jersey, which granted DOL's motion to dismiss. *Id.* at 20a–21a, 45a. The U.S. Court of Appeals for the Third Circuit reversed, holding that "Article III required" DOL to enforce promises contained in labor certifications by suit in federal district court first—its administrative proceedings did not suffice. *Id.* at 19a. The Third Circuit reasoned that DOL's enforcement actions under § 1188 were most like a contract action at common law, and thus did not come within the public-rights exception to Article III adjudication. *Id.* at 10a–13a.

B. DOL's labor-certification enforcement actions come within the public-rights doctrine, because they are more like the enforcement of a grant of right than a contract.

1. In *SEC v. Jarkesy*, this Court reminded that "matters concerning private rights may not be removed from Article III courts." 603 U.S. 109, 127 (2024). Matters concerning "public rights," by contrast, do not require an Article III court's involvement "in the initial adjudication." *Id.* at 128. A "hallmark" of a private-rights matter is that it "is made of the

3 The unpaid wages arose from improper meal deductions and Sun Valley's violation of the three-fourths work guarantee. Pet. App. 189a, 192a.

stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Id.* (quoting *Stern v. Marshall*, 564 U.S. 462, 484 (2011)) (cleaned up).

This Court has evaluated the public-rights doctrine "with care," as "[t]his is an 'area of frequently arcane distinctions and confusing precedents.'" *Jarkesy*, 603 U.S. at 130–31 (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985)). Indeed, "[t]his Court has not 'definitively explained' the distinction between public and private rights." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 334 (2018) (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) (plurality)); *see Jarkesy*, 603 U.S. at 131 ("and we do not claim to do so today").

This Court has explained, however, that the public-rights exception applies to cases that "historically could have been determined exclusively by the executive and legislative branches, even when they were presented in such form that the judicial power was capable of acting on them." *Jarkesy*, 603 U.S. at 128 (quoting first *Stern*, 564 U.S. at 485, then *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855)) (cleaned up). It has also identified certain "historic categories" that come within the public-rights exception, including "patent rights," "the granting of public benefits," and "immigration." *Id.* at 129–30.

2. An H–2A labor certification contains an employer's promises to its potential H–2A employees, to be sure, by its inclusion of the job order. Someone's acceptance of the offered terms would create a private employment contract governed by them. *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 900 (9th Cir. 2013); *Frederick Cty. Fruit Growers Ass'n, Inc. v. Martin*, 968 F.2d 1265, 1268 (D.C. Cir. 1992). But the Third Cir-

cuit's suggestion that these employer–employee promises make DOL's certification enforcement analogous to a 1789 contract action is a step too far. In fact, the legal relations produced by the H–2A program are fundamentally different than the one created between two private, contracting subjects in 1789 Great Britain.

First, DOL's H–2A regulatory criteria require contract provisions that employers might not otherwise offer. U.S. workers rarely receive full, no-cost housing and commuting benefits, for instance. The three-fourths work guarantee is also an unusual provision, as U.S. employment contracts are generally at will. *See, e.g.*, Claude D. Rohwer, *Terminable-at-Will Employment: New Theories for Job Security*, 15 PAC. L. REV. 759, 760–62 (1984) (discussing historical development of U.S. employment relationship).[4]

Second, in 1789, "employment contracts" did not yet exist, at least not in the way we understand them now. "Even in the time of Blackstone, status dictated the parameters of the employment relationship," not contract. Rohwer, *supra*, at 761. The modern free-contract relation between employer and employee did not develop until the late 19th century. *Id.*

Third, the terms and conditions of an H–2A job order are not necessarily the terms of a particular employment contract arising from it. DOL's regulations and the job orders they require set floors, not ceilings. *See* 20 C.F.R. § 655.122(a), (c), ("minimum"). Indeed, the regulations contemplate circumstances where an H–2A employer and employee create "a separate, written work contract," requiring only that it match the "minimum" terms of the job order and federal law. 20 C.F.R. § 655.122(q).

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4 These provisions also reflect the needs and demands of agricultural work.

Fourth, neither § 1188 nor its regulations explicitly give H–2A workers a private right of action to enforce the labor certification, irrespective of whatever state contract claims they may have. Instead, Congress left labor-certification enforcement to DOL, instructing it "to assure employer compliance with terms and conditions of employment under this section." 8 U.S.C. § 1188(g)(2). The regulations governing administrative proceedings bear this out. The Administrator's notice of determination orders remittance of both civil penalties and unpaid wages *to DOL*. Pet. App. 184a. And the Administrator, not injured workers, acts as plaintiff in subsequent administrative adjudications. This shows a fundamental difference between a 1789 contract claim and DOL's enforcement action: the former involves private parties enforcing private promises, whereas the latter, by its special nature, requires government action —public action—to ensure promises go filled.

Last, and most fundamentally, an employer may not import or employ unauthorized aliens in the United States without violating federal law. *See, e.g.*, 8 U.S.C. §§ 1324, 1324a. Thus two private parties could not privately establish the legal relationships that arise from H–2A employment.

These observations reveal a different legal relation at play in certification enforcement proceedings than mere contract. Instead of a private agreement between private parties, DOL's labor certification is a special governmental grant of right, exchanged on the employer's promise to follow the job order and the law. *Compare* Pet. Br. 30, 32 (describing H–2A program as "government-granted privilege"). Today we might call this a kind of license: "A privilege granted by a state * * * upon the payment of a fee, the recipient of the privilege then being authorized to do some act * * * that would otherwise be impermissible."

License, BLACK'S LAW DICTIONARY (12th ed. 2024); *see* 8 U.S.C. § 1188(a)(2) (Secretary of Labor may require fee to recover certification processing costs). But in Great Britain in 1789, this arrangement was known as a "letters patent," i.e., a "grant[] of the king." 2 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY: INTENDED FOR GENERAL USE, AS WELL AS FOR GENTLEMEN OF THE PROFESSION 75 (1792) ("letters patent"). "These grants, whether of lands, honours, liberties, franchises, *or any thing besides*, are contained in *charters* or *letters patent*; that is, open letters, *literae patentes*; so called, because they are not sealed up, but exposed to open view." *Id.* at 75–76 (first emphasis added); Ramon A. Klitzke, *Historical Background of the English Patent Law*, 41 J. PAT. OFF. SOC'Y 615, 616 (1959) (describing letters patent as "a personal and direct grant of some dignity, office, monopoly, franchise, or other privilege by the English sovereign through the exercise of the royal prerogative").

3. In 1789, the High Court of Chancery held both an equitable and legal jurisdiction. *See* 3 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 47 (1768). Chancery's legal arm, "called 'The Petty Bag,'" *United States v. Am. Bell Tel. Co.*, 32 F. 591, 604–05 (Cir. Ct. Mass. 1887); *see In re Nagao*, 4 Alaska 678, 684 (D. Alaska 1913), had many responsibilities, including the issuance of original writs needed to begin a common-law proceeding, *see* 3 BLACKSTONE 47–49; 1 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("chancery" at folio 34); Thomas O. Main, *ADR: The New Equity*, 74 UNIV. CIN. L. REV. 329, 346–50 (2005) (Chancery's issuance of originating writs flowed from royal prerogative). It also held jurisdiction "to hold plea upon a *scire facias* to repeal and cancel the king's letters

patent, when made against law, or upon untrue suggestions." 3 BLACKSTONE 47. In addition, the Petty Bag could forfeit letters patent when the rightsholder exceeded the terms and conditions of the grant. *See* 2 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 458 (1st ed. 1736) (discussing forfeiture of right to hold fair or market after exceeding terms of grant). When those conditions included a bond or recognizance, it appears Chancery could adjudge the security forfeit too. 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 452 (1923); *see* Stephen D. Billington & Joe Lane, *Procuring Promising Provisions: the British Patent System and the Navy Proviso, 1794–1831*, 30 EUR. REV. ECON. HIST. 79, 83–85 (2026) (case study of patent secured by bond). Responsibility for collection of that new debt would have then transferred to the Court of Exchequer's equitable side. *See* 3 BLACKSTONE 44–45 (Exchequer's "primary and original business" "is to call the king's debtors to account by bill filed by the attorney general").

Although this power over grants sometimes expressed itself in Chancery, it ultimately eminanted from the King's royal prerogative. *See United States v. Palmer*, 128 U.S. 262, 271 (1888) (letters patent issued in England "as a matter of grace and favor" of the King); *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 360–62 (1888); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 739–40 (1838). Thus scire facias "was not the only way to revoke a patent." Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 VA. L. REV. 1673, 1683 (2013). The King concurrently maintained the revocation power in his Privy Council until 1847, and that non-Chancery method "was the primary means for revoking patents until as late as 1753." Lemley, *supra*, at 1682. As the House of Lords (Great Britain's court of last resort in 1789) explained, "the

King has an undoubted Right to repeal a Patent wherein he is deceived or his Subjects prejudiced." *R v. Butler* (1685) 83 Eng. Rep. 659, 660; 3 Lev. 220, 220.

This Court has also held that federal courts do not possess Chancery's prerogative powers. "There can be no doubt," this Court warned, "that decisions have been made in this country * * * without carefully discriminating whether they resulted from the ordinary exercise of chancery powers, or the prerogatives of the crown." *Fontain v. Ravenel*, 58 U.S. (17 How.) 369, 384 (1854).

> The courts of the United States cannot exercise any equity powers, except those conferred by acts of congress, and those judicial powers which the high court of chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised, at the time of the formation of the constitution of the United States. Powers not judicial, exercised by the chancellor merely as the representative of the sovereign, and by virtue of the king's prerogative as *parens patriae*, are not possessed by the circuit courts.

Id.

This statement of law accords with the public-rights doctrine, which this Court first described as applying to matters "which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855). Whereas a "private right" is the "liability of one individual to another under the law," "public rights" cases "arise between the government and persons

subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932). "Such matters historically could have been determined exclusively by the executive and legislative branches." *Jarkesy*, 603 U.S. at 128 (quoting *Stern v. Marshall*, 564 U.S. 462, 493 (2011)) (cleaned up).

Thus in 1789, grants of right issued from the King or Chancery, each acting through the royal prerogative. Those grants included permissions to engage in otherwise unlawful acts. That is the appropriate analogue for the legal relation between the United States and an H–2A employer: one of grantor and grantee. The H–2A employer makes promises to the United States, and in return, the United States grants the employer the right to employ foreign workers, a right it could not otherwise enjoy. And *that relation* is what the United States administratively enforces through proceedings under § 1188(g)(2) and its implementing regulations—not a contractual relation between H–2A employer and H–2A worker.

Section 1188 enforcement proceedings are therefore well ensconced within the public-rights exception. Chancery and the Privy Council traditionally administered and enforced grants of right, not Westminster's legal courts. They are the kind of action that the executive and legislative branches could undertake without resort to the judicial power,[5] and of the sort this Court has found outside the judicial power, *Fontain*, 58 U.S. at 384. As a grant of right is the better

5 Because Great Britain did not have an independent judiciary in 1789—its high court was a legislative body, and permission to institute a lawsuit flowed from the King's royal prerogative, *see supra*—this executive–legislative–judicial distinction can crumple on close historical comparison to U.S. constitutional norms. But in this case, the distinction is clear.

traditional analogue, the public-rights doctrine should apply.

4. The Third Circuit erred by writing the United States out of the dispute, suggesting it merely stood in the shoes of harmed workers in H–2A enforcement proceedings. That perspective ignores this Court's precedents. The United States possesses an independent and distinct interest in enforcing the assurances H–2A employers must make before receiving the right to employ foreign agricultural workers on a temporary basis.

Discussing scire facias in *Mowry v. Whitney*, this Court noted, "The reasons for requiring official authority for such a proceeding," rather than allowing private parties to bring them, "are obvious." 81 U.S. (14 Wall.) 434, 441 (1871). First, any "fraud" would have been "practiced on the government, and as the party injured, it is the appropriate party to assert the remedy or seek relief." *Id.* Second, "a suit by an individual could only be conclusive in result as between the patentee and the party suing, and it would remain a valid instrument as to all others." *Id.* And third, a patentee would otherwise face "innumerable vexatious suits to set aside his patent, since a decree in his favor in one suit would be no bar to a suit by another party." *Id.*

DOL's labor-certification enforcement proceedings are on all fours with *Mowry*. First, an H–2A employer defrauds and harms the United States when it violates the promises, assurances, and obligations it made in its labor-certification application. Those promises reflect public policy, not just contract terms, and they exist to ensure an even playing field between U.S. and foreign agricultural workers. *See, e.g.*, *Barton v. U.S. Dep't of Labor*, 757 F. Supp. 3d 766, 773 (E.D. Ky. 2024) ("DOL regulates the H–2A program to ensure that

American workers are not adversely affected by the issuance of H–2A visas to foreign workers and it performs this duty through various methods."); *Mendoza v. Perez*, 754 F.3d 1002, 1008 (D.C. Cir. 2014). Second (and third), only a suit by DOL can address certification violations that impact all workers subject to it—including through certification revocation, *see infra*—and only DOL can impose civil penalties for those violations. Individual contract actions would require serial (and likely cross-jurisdictional) litigation, and they lack the civil-penalty mechanism to encourage future compliance.

These "obvious reasons" favoring a government-brought suit also show why DOL's enforcement proceedings are not analogous to a matter of private rights. They do not involve the "liability of one individual to another under the law." *Crowell*, 285 U.S. at 50. Instead, they involve an H–2A employer's failure to comply with the conditions of its labor certification, i.e., its special grant of permission to hire and employ foreign workers in the United States. These enforcement proceedings thus involve an employer's broken promises to the federal government, not promises between individuals.

5. In determining whether an action is legal in nature, this Court considers both "the cause of action and the remedy it provides." *Jarkesy*, 603 U.S. at 123. Because "some causes of action sound in both law in equity," the remedy can be "the 'more important' consideration." *Id.* at 123 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989)). It should not be the most important consideration in this case, however, because Chancery and the Privy Council undoubtedly had a jealous jurisdiction over issuing and enforcing the Crown's special grants of right. The problem this Court has confronted before—that fraud, *see Granfi-*

nanciera, 492 U.S. at 43; *Jarkesy*, 603 at 134 (explaining "*Granfinanciera* effectively decides this case"), and public nuisance, *Tull v. United States*, 481 U.S. 412, 423–24 (1987), have both legal and equitable causes of action—does not exist in this case.[6] Because the public-rights exception applies to DOL's cause of action, the Court need go no further. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality) ("But when Congress creates a statutory right, it clearly has the discretion, in defining that right, to * * * prescribe remedies * * * *").

And yet the remedies available to DOL through its enforcement proceedings *are* analogous to those available in 1789 when a rightsholder violated its grant's terms. Just as the King could revoke a letters patent as a matter of royal prerogative, *see* Lemley, *supra*, at 1680–84, so too may DOL revoke an approved labor certification, 20 C.F.R. § 655.1317. True, this case does not (yet) involve a revocation. Respondent challenges a § 1188 enforcement order to remit unpaid wages and civil monetary penalties to DOL, Pet. App. 183a–184a, and certification revocations require a separate proceeding, 20 C.F.R. § 655.1317(b). But the two actions are nestled together. OFLC may revoke a certification only when it finds that the employer has done certain things, like (1) making a willful misrepresentation in its application; (2) willfully violating a material term or condition of the certification; (3) not curing a substantial housing-standards violation; and (4) failing to comply with administrative or court orders "secured * * * under" § 1188. *See* 20 C.F.R. § 655.1317(a). All four findings may arise from, or receive a hearing

6 This Court's decision in *Curtis v. Loether*, which originated the "[m]ore important" language about "relief sought," involved an unquestioned legal action (tort) and remedy (damages). 415 U.S. 189, 195–96 (1974).

in, a § 1188 proceeding, *compare* 29 C.F.R. § 501.16(a)(1), and the Wage Hour Administrator "may recommend" revocation to OFLC on the basis of its investigations and enforcement actions, 29 C.F.R. § 501.20(i). Thus these provisions act in tandem, with the § 1188 proceeding serving as predicate to a revocation proceeding. Cross-referenced and intertwined, this Court should view them together.

In addition, a scire facias action in 1789 could hold forfeit any security attached to the challenged grant of right. The H–2A employer's required "assurances and obligations" function similarly. 20 C.F.R. § 655.135. The potential for civil penalties, the promise to abide the approved contractual minimums, and the promise to follow the law and regulations, each acts as a bond "securing the[] performance" of the petitioning H–2A employer, so that it will operate in the narrow way Congress intended. *See* 1 HOLDSWORTH 452. Determining that an employer owes penalties or unpaid wages, then, is the same kind of determination that Chancery would make about a recognizance's forfeiture. Also similar is the ultimate enforcement mechanism: if an employer does not pay the amounts ordered by the agency in 180 days, despite lawful orders requiring it, then DOL submits the debt to the United States Department of the Treasury for legal enforcement. *See* 31 U.S.C. § 3711(g)(1). Treasury has thus taken a similar function to the Court of Exchequer in 1789, which also collected the Crown's unpaid debts.

6. By selecting a letters-patent mechanism to regulate employment-based migration into the United States, Congress walked in medieval England's footsteps. As early as the fourteenth century, English sovereigns issued letters patent "to induce skilled artisans to come to England." Klitzke, *supra*, at 623–24. They "were like passports," permitting foreign

nationals "to come to England and practice their trade." *Id.* at 624. These grants allowed what "the common right" "clearly" prohibited. *Id.* at 625. They also carried terms and conditions, like requiring the rightsholder to "train Englishmen" in their specialty production. Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L. REV. 1255, 1260–61 (2001); Klitzke, *supra*, at 639–44 (discussing various consideration that attached to immigrant-employment letters patent during Elizabethan era). They had "nothing to do with legal rights * * * per se, but rather * * * represented royal privileges that supported royal policies." Mossoff, *supra*, at 1261.

So too for DOL's labor certifications. The labor certification exists to permit employers to temporarily employ a narrow class of otherwise unavailable workers, with regulations emphasizing protections for the domestic labor market. *See N.C. Growers' Ass'n, Inc., v. United Farm Workers*, 702 F.3d 755, 759 (4th Cir. 2012). The letters patent permitting foreign nationals to migrate to and conduct business in medieval England did the same thing. DOL also issues certifications to employers in exchange for their adherence to legally mandated terms and conditions, i.e., "assurances and obligations," that advance its policy goals—just like the terms and conditions of letters patent helped English monarchs develop local industry. Thus a grant of right is not just the better analogue for the cause of action and remedies available to DOL under § 1188; it is also the better historical analogue for the H–2A program itself.

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DOL's § 1188 enforcement actions are most analogous to those enforcing the terms of letters patent in

1789. DOL's available remedies also track those available to the Crown for addressing violations of a grant's terms. Chancery's Petty Bag had jurisdiction over such actions, but the King more commonly addressed them through his Privy Council; both ultimately acting by royal prerogative. DOL's § 1188 enforcement actions are thus not of the stuff heard at Westminster Hall in 1789. They are not private matters involving individual-to-individual claims. They are instead public-rights matters, and as such, adjudication of them need not begin in an Article III court.

Conclusion

Based on the foregoing, we respectfully urge this Court to vacate the Third Circuit's decision and remand for further proceedings.

Respectfully Submitted,

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